

CALAIS DEVELOPMENT REVIEW BOARD

Re: Application of McCullough Crushing, Inc.
and William and Muriel Hudson
for a Conditional Use Permit

Application # 07-07

This decision pertains to an Application for Conditional Use Approval, #07-07, to expand the gravel extraction operations of McCullough Crushing, Inc., in the Town of Calais, Vermont. For reasons explained below, the Calais Development Review Board concludes that Application #07-07 does not comply with the applicable Land Use & Development Regulations for the Town of Calais (Adopted March 1, 2005; amended March 7, 2006; Amended March 6, 2007) and hereby denies approval, without prejudice.

I. Procedural History

On or about February 21, 2007, McCullough Crushing, Inc. (“McCullough”) and William and Muriel Hudson (collectively, “Applicants”), filed with the Calais Zoning Administrator an application for Conditional Use Approval (CUA), Application #07-07, requesting approval to extend gravel extraction operations from their existing two pits off Route 14 to include gravel extraction on an adjacent tract of land, formerly owned by Clifford Rathburn and recently acquired by McCullough. The existing gravel pits and proposed area of expansion are located a few miles north of East Calais Village, to the west of Route 14 and north of Balentine Road, in the Town of Calais’ Rural Residential District (“RRD”). In the RRD, extraction and quarrying are conditional uses requiring approval by the Calais Development Review Board (“DRB” or “Board”), pursuant to Tables 2.2, 4.4, and 5.3 of the Land Use & Development Regulations for the Town of Calais (“Regulations”).

Following required newspaper notice and personal notice to adjoining property owners, the DRB convened a public hearing to review Application #07-07. The DRB took testimony and received exhibits on May 2, 22, 29, June 12, 19, July 10 and 17, 2007. The DRB also conducted a site visit of the existing gravel pits, proposed extraction area, and adjacent properties on May 5, 2007. The DRB adjourned its hearing on July 17, 2007, and promptly began deliberations, culminating in the issuance of this decision on August 31, 2007.

Members of the DRB participating in the review of Application #07-07 were: Kristina Bielenberg, Acting Chair; Barbara Weedon, Sharon Winn Fannon, Walt Amses, Member; and Ruth Porter. Stephen Duke participated in the hearing phase of this proceeding, but as explained below, declined to participate in the deliberative phase and decision in this matter. Margaret Bowen, Chairman of the DRB, and Member Steve Reynes recused themselves *prior* to the first hearing in Application #07-07.

Throughout this proceeding, the Applicants were represented by Donald Marsh, P.E. The neighbors appeared *pro se*.

II. Preliminary Issues

A. Party Status

Application #07-07 attracted the interest of many adjoining property owners and other persons in the neighborhood of the proposed project. Some of these individuals participated in prior zoning proceedings involving one or both of the existing permitted gravel pits.

The DRB has always welcomed testimony from members of the public on projects that may adversely affect important public values identified in the Town Regulations or Town Plan. However, for the purpose of identifying individuals who might qualify as “interested persons” under the Vermont Municipal and Regional Planning Development Act, the Board has looked to the definition in 24 V.S.A. sec. 4465. This statute recognizes that certain classes of persons have the right to appeal a DRB determination to Environmental Court.

The first definition relevant in this proceeding is found in 24 V.S.A. sec. 4465(b)(1), which would include persons, such as the Applicants: “A person owning title to property, . . . affected by a bylaw, who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case.” The Applicants, Fred and Scott McCullough d/b/a McCullough, and William and Muriel Hudson, as the lessors of the Hudson pit property, fit into this category of “interested persons,” particularly if they should exhaust their administrative remedies in attempting to secure Town approval of their CUA application and elect to appeal the DRB’s decision to Environmental Court.

The second definition relevant to this proceeding is found in 24 V.S.A. sec. 4465(b)(3). This statutory section states:

A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.

Under this definition, the DRB concludes that an adjoining property owner who appeared at the hearing on Application #07-07 and voiced his or her concern with regard to one or more physical or environmental impacts to his or her “interest under the criteria reviewed” qualifies as an “interested person.” However, the statutory definition found in 24 V.S.A. sec 4465(b)(3) is not limited to adjoining property owners. It also recognizes

“[a] person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act” taken under Chapter 117, the Vermont Municipal and Regional Planning Development Act, which includes local CUA decisions. The Environmental Court has construed the term “immediate neighborhood” by examining not only the proximity of the challenged party’s property to the project on appeal, but also whether that individual “potentially could be affected by any aspects of the project which have been preserved for review on appeal.” Determinations of who fits within the ambit of the “immediate neighborhood” definition are made on a “case-by-case basis” and largely depend “on the physical environment surrounding the project property and its nexus to a particular interested person and their property.” In re Appeal of A. Johnson Company, Docket No. 130-7-05 Vtec (Vt. Env’tl. Ct., March 26, 2006) (decision addressing dismissal of persons in the immediate neighborhood of proposed sand and gravel extraction operation).

Given the above statutory and decisional law, the DRB concludes that the following persons have demonstrated that they are “interested persons” for the purposes of providing testimony and evidence and participating in the examination of other parties’ and their witnesses in the hearing in Application #07-07:

1. Adjoining property owners *Rick and Joan Hudson*, based on the potential noise, dust, and aesthetic impacts of the proposed project;
2. Adjoining property owners *Michele Hudson*, based on the potential noise and aesthetic impacts of the proposed project;
3. Adjoining property owners *Kevin Wells* (former Florence Hartman residence), based on the potential noise, dust, surface and ground water impacts of the proposed project;
4. Adjoining property owner, *Flo Hartman, and resident Dan Hartman*, based on the potential noise, dust, vibration, and surface and groundwater impacts of the proposed project;
5. Adjoining property owners *Alexander, Douglas, Stuart and Elizabeth Meiklejohn*, based on the potential noise, dust, and aesthetic impacts of the proposed project;
6. Adjoining property owners *Colin and Jane Seaman*, based on the potential noise, dust, and aesthetic impacts of the proposed project;
7. Adjoining property owners *Lance and Bonnie Boardman*, based on the potential noise, dust, wildlife, and aesthetic impacts of the proposed project; and
8. Adjoining property owners *Peter and Jan Brough*, based on the potential noise, dust, and aesthetic impacts of the proposed project.

The Town of Calais and the State of Vermont are also potential “interested persons” in that they own property surrounded by the Applicants’ existing pits and share an access road that is proposed to be used by the Applicants to haul gravel and other earth resources from the proposed expanded extraction area. However, neither the Town nor the State entered their appearances in this proceeding.

Additionally, the following persons attended the hearing in Application #07-07, but did not demonstrate that they were “interested persons” within the meaning of 24 V.S.A. sec 4465(b)(3):

1. *Mark Moodie*, a *potential* purchaser of property to the east of Route 14 now belonging to Flo Hartman;
2. *Reese Hersey*, a *potential* purchaser of property from *Peter and Jan Brough*;
3. *Greg Kessler*, a resident of the Town of Woodbury near Woodbury Lake.

Other persons attending the hearing, but not requesting party status were: Jenne King, Chris Sairs, Joshua Gouge, Clifton and Ruth Rathburn, and Donald Singleton, Jr. Mr. Sairs and Mr. Gouge are each involved in the construction business and currently haul and use the earth resources of McCullough. They provided limited testimony, on behalf of the Applicants. Donald Singleton, Jr., is the Town Road Commissioner, but he stated on May 29, 2007, that he was not appearing in his official capacity for the Town.

Two expert witnesses offered testimony on the noise impacts of the project: for the Applicants, David Wechsler, Senior Scientist, New England Air Quality Testing, Burlington, Vermont; for the neighbors, Les Blomberg, Executive Director, Noise Pollution Clearinghouse, Montpelier, Vermont.

B. Motion to Recuse

During the course of the hearing in this matter, several neighbors asked the DRB to consider whether Member Stephen Duke should recuse himself due to an alleged conflict of interest and pre-judgment of the merits of Application #07-07. Their concerns were expressed in a letter to the DRB, dated June 22, 2007, and received by the Town of Calais on June 26, 2007. The letter was signed by Peter and Jan Brough, Lance and Bonnie Boardman, and Colin and Jane Seaman.

In response to the neighbor’s oral and written request, Member Duke declined to recuse himself during the course of the hearing. Following the hearing phase of this proceeding, Mr. Duke elected not to participate in deliberations or the decision in this matter. He did not formally recuse himself, as he does not concede that he had an actual conflict of interest or was in any way predisposed toward one party or another. However, he wished to *not* make his continued involvement in Application #07-07 an issue that would undermine the public’s confidence in the integrity of the decision making process.

The Calais Board of Selectboard has not adopted an ethics or conflict of interest policy governing the conduct of appointed officials, let alone a policy specific to Members of the DRB and DRB Alternates. *See* 24 V.S.A. sec. 2291(20) (Town has power to establish a conflict of interest policy to apply to all elected and appointed officials of the town.) The DRB believes that the Town of Calais should adopt such a policy to guide the conduct of its citizen boards, including the conduct of the DRB, in order to assure that parties in specific Town proceedings are treated fairly and that public confidence in the citizen governance process is not eroded.

III. Findings

A. Past Permits and Operations

Application #07-07 calls for the expansion of existing gravel extraction and processing operations by the Applicants to an adjacent parcel of land, formerly owned by Clifton and Ruth Rathburn and recently purchased by McCullough. Throughout the hearing in this matter, the Applicants' consultant urged the Board to evaluate the merits of the proposed expansion independent of its prior permitted operations. For reasons set forth in the Discussion section of this decision, the Board declines to do so, concluding that the operations of the expanded pit are inextricably connected to the prior approved operations and permit conditions. Therefore, the Board includes findings that relate to the historical development and permitting of the McCullough gravel pit operations off Vermont Route 14 in the Town of Calais in addition to a description of the project proposed in Application #07-07.

In April 1983 McCullough obtained permit 83-19 from the Town of Calais ("Town") to operate a sand and gravel pit on approximately 20 acres of land leased by Dwight McCullough from James William Hudson, Jr., and Muriel Hudson (hereinafter, the "Hudson Pit"). The 20 acres was part of a 24.1 acre parcel located in the northwesterly corner of the intersection of Vermont Route 14 and Town Highway 16 ("Balentine Road"). In May 1983, McCullough submitted a Land Use Permit Application ("1983 Land Use Permit Application") to the District 5 Environmental Commission. The 1983 Land Use Permit Application described the project as excavation involving "approximately 2 acres at a time with the annual yield of between 15,000 – 20,000 cubic yards." Excavation was to be done in "three lifts with each lift approximately 40 feet deep," and all sloping and drainage work was to be done concurrently. McCullough also described the project as involving "some screening and crushing," with all work to be done in conformance within the standards of the U.S. Bureau of Mines. The project was to start in June 1983 and the permit expiration date was June 2003.

Land Use Permit, 5W0738, was issued on July 11, 1983. The Findings of Fact and Conclusions of Law for that permit describe the Hudson Pit as generating approximately 1,650 vehicle loads annually with the majority of vehicle trips occurring during the month of October when, according to McCullough, the towns of Calais, Woodbury, Worcester, Cabot, Marshfield and Plainfield would be stockpiling material for winter maintenance of town roads. Access to the Hudson Pit was approved from Balentine Road, but subsequently the Applicants entered the pit from Vermont Route 14, using the access route discussed below.

Land Use Permit 5W0738 imposed various conditions, which primarily addressed reclamation of the pit and establishing 50-foot isolation distances from adjacent property lines. In order to reduce the visibility of the Hudson Pit from the main public right-of-way during the anticipated twenty years of operations, McCullough was required to maintain a screening ridge between Vermont Route 14 and the excavation until the final

stages of pit removal. The Findings and Conclusions of Law for Land Use Permit 5W0738 noted that calcium chloride would be used on roadways within the project during periods of dust conditions.

In August 1985, Dwight McCullough and Frederick Brousseau (“McBro Applicants”) filed an Act 250 Application, #5W0842, for a 45-acre gravel pit with related crushing, washing, and screening operations, to be located on a 53.9 acre parcel west of Route 14 in Calais (hereinafter, the “McBro Pit”). They also applied shortly thereafter for a Conditional Use Permit, #85-39, from the Town to allow development of the same project under the Calais Zoning Regulations. On October 16, 1985, the Calais Zoning Board of Adjustment granted a Condition Use Permit #85-39, with conditions, for the McBro Pit. On December 3, 1985, the District #7 Environmental Commission issued Land Use Permit #5W0842 and supporting Findings of Fact and Conclusions of Law and Order. Land Use Permit #5W0842 established a project expiration date of November 1, 2011.

The McBro Pit, approved by the Town and Act 250, is located north of the Hudson Pit and adjacent to pits then operated by the State of Vermont and the Town. The McBro Pit was developed adjacent to the Kingsbury Branch of the Winooski River and lands owned by the Town (Calais Town Garage), the State of Vermont, Hartman/Bussiere, Clifton and Ruth Rathburn, and the Donald Meikeljohn and Hudson families. Access to the McBro Pit has been from a gravel road leading from Vermont Route 14, the location of which has changed during the life of the permit. According to Conditional Use Permit #85-39, the gravel access road was “to be paved by the late spring of 1987.”

McCullough and Brousseau represented to the Town during the proceeding on Conditional Use Permit Application #85-39 that pit operations at the McBro Pit would result in “an average of 43 truckloads per day during peak periods of operation.” In the Act 250 proceeding in Land Use Permit #5W0842, the District #7 Environmental Commission found that in a peak year at the McBro Pit, 90,000 cubic yards of materials would be removed for the project site, “the average number of trucks exiting per day would be 43.”

Conditional Use Permit #85-39 issued by the Town imposed certain conditions to mitigate anticipated impacts of the project. These included limitations on the days and hours that the pit could operate to address the potential for excessive traffic and noise and conditions governing the reclamation of the pit. To mitigate noise and traffic impacts, the Town limited operation of equipment within the pit (except for maintenance purposes) to Monday through Friday, 7:00 a.m. to 5:00 p.m., except for ten days per year, and in emergency situations declared by one or more of the Boards of Selectmen of the five towns expected to purchase gravel from the pit. The Town also prohibited operation on the Saturday of Fall Foliage activities and July 4th.

Additionally, in the Act 250 proceeding, to mitigate adverse impacts, the McBro Applicants agreed to disturb no more than six acres of the site (in addition to the crushing/screening operation area) at any given time, to retain 25- to 100-foot

undisturbed buffer areas around the perimeter of the pit, and to restore or improve the deer wintering area identified on the property as reclamation proceeded.

Land Use Permit #5W0842 authorized the construction of a 20' x 80' x 5' deep pond to be excavated 25 feet from the Kingsbury Branch of the Winooski River to "collect groundwater for the washing operation." Water from this pond was to be pumped to a collections pond at the southern end of the pit, and then the water was to be used for washing and collected in a series of desilting ponds for reuse as wash water. While the recycled wash-water was deemed sufficient to meet the needs of the project "under normal conditions," the McBro Applicants sought approval to draw water directly from the Kingsbury Branch if the need for additional water occurred. The District #7 Environmental Commission found in 1985 that the average year-round flow of the Kingsbury Branch is 27 cubic feet per second, but it concluded that the withdrawal of excessive amounts of water directly from the river might have an adverse impact on the fish population. It, therefore, imposed Condition #6 in Land Use Permit #5W0842 stating, in relevant part that "[n]o water shall be drawn directly from the Kingsbury Branch without the prior written approval of the Agency of Environmental Conservation." It also required that a 25-foot undisturbed buffer area be maintained between the "groundwater-collection pond" and the bank of the Kingsbury Branch.

The District #7 Environmental Commission found that the primary sources of noise from the McBro Pit would be operation of the crushing and screening equipment and back-up alarms on trucks and bucket loaders. The Commission found that the noise levels generated by project operations would not harm the health of persons working at the project "or living nearby." However, the Commission found that the noise impact "could be adverse to surrounding residential and second-home uses since the character of the area overall [was] rural residential with second-home, camp and recreational use." Nevertheless, the Commission found that there were several factors that would mitigate the noise produced by project operations. These included the location of the crushing and screening operations in an area that would be substantially lower than the surrounding terrain and because there was existing vegetation that would be "maintained around the perimeter of the Phase I area." In any event, the Commission found that the noise generated by back-up warning alarms on trucks and bucket loaders must be louder than background noise levels and that these alarms would be audible from beyond the perimeter of the gravel pit.

The McBro Applicants offered to operate the back-up alarms at a low setting of 87 decibels (rather than a high of 107 decibels) "whenever permitted in accordance with applicable regulations" and they offered to minimize the need to move equipment in reverse. The Commission imposed Condition #10 in Land Use Permit #5W0842 to memorialize the expectation that the McBro Applicants would operate their equipment so that back-up alarms would be set at the low setting, provided that such operation conform with federal regulations. The Commission also imposed restrictions on days and hours of operations to mitigate noise and traffic.

The Commission also found that the McBro Pit operations would generate fugitive airborne dust particles from the gravel-crushing operations and from use of equipment on the haul roads throughout the pit. It found that dust also could be generated from gravel stockpiles. However, it found that the McBro Applicant's planned application of water and/or calcium chloride to haul roads and use of water on stockpiles sufficient to control dust generated by the project. The Commission imposed only a general condition, Condition #19, in Land Use Permit #5W0842 to control fugitive dust emissions in conformance with the Vermont Air Pollution Control Regulations.

The Commission also made certain findings and imposed certain conditions to preserve certain natural resources within or in proximity to the McBro Pit. It found that a portion of the McBro Pit would be located in a mapped deer wintering range, with the area of most intensive deer utilization being on the south-facing slope "within the Phase IIA portion of the pit." The Commission also imposed certain cutting and reclamation requirements to preserve existing dense vegetation or to require the replanting of appropriate trees, especially around the perimeter of the McBro Pit. By imposing these conditions, it could accomplish the several goals of reducing adverse impacts on the deer wintering yard, mitigate the adverse impacts of noise from equipment used in the pit's operations, and create a scenic buffer. The conditions in Land Use Permit #5W0842 which addressed the protection, maintenance, and even improvement of this vegetative buffer, were: Condition #4 (general condition); Condition #15 regarding Reclamation and Logging on Lots #7 and 10, under the direct supervision of the then Agency of Environmental Conservation, Fish and Wildlife Department ("Department"); Condition #16 regarding cutting and work within the Phase II and Phase III sites; and Condition #17 limiting gravel extraction activities during the period December 1 through March 31 unless expressly exempted, in writing, by the Department from such requirements. Moreover, the expectation was that the existing vegetation around the perimeter of the Phase I area would be maintained, thereby minimizing to the extent possible the noise generated by crushing and screening.

Finally, the Commission established a specific condition regarding the phased reclamation of the entire McBro Pit. Condition #13 required that no more than six acres of active working face could be disturbed at any time and a total disturbed area of no more than 15 acres, including stockpiles and crushing/screening operation areas, was permitted. Additionally, the McBro Applicants were required to certify each year, in writing, that the excavation completed during the previous year had been reclaimed in accordance with the approved plans.

On July 26, 1988, the District #5 Environmental Commission issued Land Use Permit #5W0738-1 and 5W0842-1, authorizing the elimination of buffer zones on the common property lines for the Hudson and McBro Pits and the creation of a reclaimed slope between the two adjacent pits. The expiration date of this permit was November 1, 2010. On April 28, 1993, the Commission issued Land Use Permit #5W0842-2 authorizing McCullough to use approximately one acre of the McBro Pit to stockpile granite grout, blacktop, and cement rubble for crushing during the summer months of operation. The expiration date of this permit was November 1, 2010. On March 26,

2004, the Commission issued Land Use Permit #5W0738-2 extending the expiration date of the Hudson Pit to November 1, 2010. At no time did the Applicants obtain approval from the Town to alter buffer zones, expand the scope of operations, or amend the expiration date for the project.

B. Description of Proposed Expansion

The Board's Minutes reveal that Scott and Fred McCullough, sons of Dwight McCullough, d/b/a McCullough, met with the Town Development Review Board on March 30, 2006, to discuss the proposed expansion of McCullough's gravel extraction operations on Vermont Route 14. McCullough represented at that meeting that the present operations had run out of bank run sand and there was only a limited amount of gravel left. They proposed to purchase approximately 35 acres from an adjoining landowner (unnamed in the Minutes), and they proposed to expand their operations in a westerly direction within a proposed 5 acre area. McCullough requested to meet with the Board to see if there were any major problems with meeting the new zoning regulations "which would prevent their proposed project."

On or about February 21, 2007, McCullough's consultant, Donald Marsh, P.E., filed an application with the Calais Zoning Administrator proposing to expand its existing gravel extraction operations at the Hudson Pit and McBro Pit in a westerly direction to include 15 acres of a 35.5 acre parcel, recently acquired by McCullough from Clifton and Ruth Rathburn (hereinafter, "Rathburn Extraction Area" and "Rathburn Parcel," respectively).. In this application ("Application #07-7"), the Applicants refer to the Hudson and McBro Pits collectively as the McCullough Crushing Pit. The Applicants proposed to extend sand and gravel extraction, for commercial purposes, to the Rathburn Extraction Area, with the primary purchasers being towns within Central Vermont and also area contractors and builders.

During the initial phase of the project, the Applicants propose to access the Rathburn Parcel from Balentine Road in order to construct an earthen berm adjacent to the old Rathburn homestead. The purpose of this berm is to create a visual and partial sound barrier between extraction operations in the Rathburn Extraction Area and the Colin and Jane Seaman home. Except for this limited purpose, the Applicants propose to access the expanded area throughout the extraction and reclamation phases from the Vermont Route 14 access road, the existing road network within the Hudson and McBro Pits, and any new roads developed in the McCullough Crushing Pit during the course of earth resources extraction. The Applicants propose to haul earth resources from the Rathburn Extraction Area to their existing gravel processing plant (crusher, screens, wash and desilting ponds) in the Hudson Pit. Water for this operation will be drawn from the existing "groundwater-collection" pond in the McBro Pit and from recycled water from the desilting ponds in the Hudson Pit.

The Applicants propose to operate the extended gravel extraction and processing operations on days and for similar hours as those authorized in their prior Land Use and Town permits. During the course of the hearing, the Applicants agreed to operate

Monday through Friday from 7:00 a.m. to 6 p.m. (with extraction and crushing operations ending at 5:00 p.m.) and on Saturdays from 7:00 a.m. to 12:00 noon, with the normal months of operations being from April 1 through November 30, with occasional use during winter months if nearby Towns require road sand or gravel for roadway repairs. As with the existing operations, the Applicants propose that the pit be allowed to operate during declared emergencies. Similar seasonal and time of day limitations were imposed in prior permits largely to address noise and traffic impacts of the McCullough operations.

The McCullough Applicants propose to remove sand and gravel from the Rathburn Extraction Area at a rate of approximately 110,000 cubic yards per year. A small gravel pit was previously operated at the eastern edge of the Rathburn Parcel and the Applicants have performed test pits to confirm that good quality gravel and other earth resources are present in the proposed Rathburn Extraction Area. The Applicants assert that their proposed extraction rate of 110,000 cubic yards per year represents the total permitted rates for the Hudson and McBro Pits. In other words, they have added the 90,000 cubic yards per year approved for the McBro Pit in 1985 in Land Use Permit #5W0842 and the approximately 20,000 cubic yards per year approved for the Hudson Pit in 1983 in Land Use Permit #5W0738 to achieve an equivalent total extraction rate of 110,000 cubic yards per year. The Applicants estimate that at the rate of 110,000 cubic yards per year the estimated life of extraction activities described in Application #07-07 will be 10 to 13 years, depending on market conditions and the quality of the earth resources found in the Rathburn Extraction Area. Therefore, the Applicants propose to close and stabilize their expanded extraction area by 2020.

At the rate of 110,000 cubic yards per year, the Applicants represent that the truck traffic coming and leaving the pit will not exceed the present permitted truck traffic for the Hudson and McBro Pits and therefore the impact on State and Town roads will be no greater than the traffic currently generated by the Hudson and McBro Pits. The Applicants stated during the hearing, however, that in the past five years the rate of extraction at the Hudson and McBro Pits has been less than 100,000 cubic yards per year. Over the past year, extraction is down one third from approximately 100,000 cubic yards five years ago.

When asked during the hearing whether loaded trucks leaving the expanded project would likely present a burden to the Town by damaging dirt roads, especially during spring thaws, the Applicants asserted that: (1) they had no control over the independent contractors who purchased earth resources from their pit but the Town could post its roads to restrict heavy trucks during those times of the year of greatest concern; and (2) most of the hauling by neighboring Towns would occur not in the spring, but in October and November in preparation for the winter snow season.

The Applicants have represented that the use of water for processing earth resources will be no greater than that authorized by current permits and the Department of Environmental Conservation (750 gallons per minute). They report that actual usage as never exceeded 450 gallons per minute, but they offered no logs or other evidence to

substantiate their history of water usage at the Hudson and McBro Pits. At the hearing, the Applicants' consultant observed that there had been no known problems with groundwater supplies in the past and he stated that his clients didn't anticipate any problems in the future. He asserted that the floor of the current pit as well as the proposed expansion will be no closer than five feet above the groundwater table, with the exception of the wash-water collection pond.

Several neighbors between Route 14 and the existing pits, however, questioned whether these representations were accurate. They alleged that the current McCullough operations had resulted in or contributed to the discoloration of their domestic water supplies and, in Dan Hartman's case, the alleged loss of all domestic water for an unspecified period of time. Route 14 neighbors also inquired how proposed operations might affect the flow of the Kingsbury Branch of the Winooski River and its fisheries. The Board heard anecdotal evidence that the Kingsbury Branch, which runs adjacent to the McBro Pit, had in recent years dried up in spots. The Applicants denied that the drawing of groundwater for gravel washing was contributing to these problems, but they offered no hydrologic data to refute the neighbor's testimony.

The Applicants have attempted to address the aesthetic impacts of their project on the character of the area through screening and other devices. In order to evaluate the effectiveness of these proposed mitigation measures to reduce adverse visual impacts and noise it is important to understand the neighborhood – or rather neighborhoods -- in which the existing and proposed earth resource operations are sited.

As indicated above with reference to prior permitting decisions, the north and northwest portions of the existing McCullough operations and a portion of the Rathburn Parcel are covered with dense woods, dominated by coniferous species. On the east side of the Hudson and McCullough Crushing Pits, nearest Vermont Route 14, there is a small neighborhood of homes, trailers, and sheds on either side of the highway. Surrounded by the Hudson and former McBro Pits are the Calais Town Garage and a Vermont State Gravel Pit. On the south and south west side of the Hudson Pit is Balentine Road with two homes (Michele Hudson and Rick and Joan Hudson). An additional house (Lance and Bonnie Boardman) overlooks the Rathburn Parcel; it is located on the westerly side of Batten Road near where it intersects with Balentine Road and is at a higher elevation than the Rathburn Parcel. A fourth house and barns are located on the Rathburn Parcel – the old Rathburn homestead, along with the hay field noted above. At the far northwesterly corner of the Rathburn Parcel is the home and property of Colin and Jane Seaman. Between the proposed Rathburn Extraction Area and the McCullough Crushing Pit and extending to the south and west of the Hudson Pit is a buffer zone of native mixed hardwoods and conifers.

The abutting neighborhood along Route 14 and the neighborhood along Balentine Road are dissimilar in character. The neighborhood along Route 14 is within close proximity to the current pit operations. Indeed, access to Town Garage and State pit are by right-of-way through a residential property. That neighborhood experiences the noise of the trucking and crushing operations from current pit activity as well as heavy and fast

moving traffic along Route 14 including noise from trucks unrelated to the gravel pit. Residents there report being affected by noise, dust and possible water problems from current pit operations, but do not identify scenic value as a resource compromised or potentially compromised by the continued operations of the McCullough pit, as long as the naturally vegetated berm at the Hudson Pit and buffer zones remain in place.

To mitigate the visual impact of the expanded excavation activities from Vermont Route 14, the Applicants propose to retain the screening ridge required under the terms of the 1983 Land Use Permit 5W0738 until the very final phase of project development.

In contrast, Balentine Road, a Class 3 dirt road, lends itself to slow travel by local residents. It is not subject to traffic from pit trucks or heavy traffic from Route 14. The road is primarily wood-lined, except along the Rathburn Parcel and Seaman property where the views to the east and north are across an existing expansive hay field. The hay field is a prominent and distinctive feature of the landscape, much prized for its aesthetic qualities by persons residing in the neighborhood. At present, there is no view from Balentine Road of the existing McCullough Crushing Pit operations and very limited noise from current pit operations is audible in this neighborhood.

Because certain early phases of the extraction process will be visible and audible from portions of the public right-of-way of Balentine Road, the Applicants propose a number of mitigation measures. They propose to create an earthen berm at the northwesterly end of the Rathburn Parcel near the old Rathburn homestead to visually screen the project from the Seaman property and, as discussed below, to attenuate noise generated by the project.

To minimize the visual impact of the project in the Balentine Road neighborhood, the Applicants have submitted a revised landscaping plan. The revised landscaping plan calls for the planting of mixed native species of trees and shrubs between the northeasterly side of Balentine road and the edge of the Rathburn Expansion area extending south toward the Rick and Joan Hudson property. The Applicants have also proposed to retain some of the natural fence line and tree growth adjacent to the Rick Hudson property.

The Applicants concede that no mitigation has been planned to conceal project operations from the Boardman property. Those operations will be visible from the Boardman property during the life of pit on the Rathburn Parcel. The Applicants assert that the sight lines of the finished pit will be such that the reclaimed Rathburn Extraction Area and McCullough Crushing Pit will be largely invisible, except to the Boardmans and persons in the public right-of-way on Batten Road up the hill from the intersection with Balentine Road. Those portions of the McCullough property viewed from the Boardmans' property and Batten Road right-of-way will appear as grassed meadow surrounded by woodlands.

The Applicants also acknowledge that the pit will generate noise. In support of their application they presented a report, dated January 22, 2007, from New England Air

Quality Testing (NEAQT) detailing the results of a sound level survey that NEAQT conducted at the current McCullough Crushing Pit. The report details NEAQT's findings relative to current sound levels and provides an assessment of sound levels at the proposed property lines. NEAQT conducted its testing on November 30, 2006 during normal crushing operations. The report notes that deciduous trees had dropped their leaves. The temperature was 61.5 degrees Fahrenheit and winds were from the southwest at one to five miles per hour.

During the course of the hearing, the Applicants asked the DRB to adopt a 55 dBA noise standard for residences adjacent to quarrying operations and 70 dBA as the standard for maximum instantaneous sound levels at the property boundary. The Applicants referred to the Act 250 decision in Re: Pike Industries, Inc. and Inez M. Lemieux, Land Use Permit #5R1415-EB in support of the noise standards they relied upon in their study and design of the project.

NEAQT collected sound level readings from six locations along the property boundary of the current McCullough Crushing Pit. Each of the six locations was along the direct line of sight with the crusher operation. Importantly, all of the readings were collected within a time span of approximately one hour and ten minutes. The average sound level results ranged from a low of 56.2 dBA at L1 location to a high of 75.7 dBA at L6 location; the L5 location average was 75.5 dBA. The maximum levels recorded ranged from 57.8 dBA (again at L1) to 81.1 dBA at L5.

In addition to providing current sound levels, the NEAQT report predicted sound levels for five property line locations in the event the pit operation expands as the Applicants propose. The report notes that the predictions provide a worst case scenario, because the locations used for predicting sound levels do not have, nor are they expected to have in the future, a direct line of sight to the sand and gravel crusher, which the report notes as the noise source.

NEAQT's "worst case scenario" predicted maximum sound levels at the property line ranging from 56.8 dBA (P1 location) to 70.7 dBA (P4 location). NEAQT predicted noise levels for all five locations above 55 dBA, the noise standard the Applicants urge the Board to apply. In its mitigation discussion, NEAQT focused on only two locations: P1 (the R. Hudson residence) and P5 (the former Rathburn residence).

As mitigation, NEAQT considered: 1) the effects of existing natural terrain and 2) the six foot high earthen berm the Applicants propose to construct adjacent to the old Rathburn homestead. NEAQT noted that the natural terrain in the area of P1 (the Hudson residence) would provide a natural sound attenuation of 13 dB, which would reduce the predicted sound level from the original 56.8 dBA to 43.8 dBA. With regard to noise mitigation at location P5, the former Rathburn residence. NEAQT predicts the six-foot berm would provide a barrier attenuation of 14 dB, thus reducing the sound level at the P5 location to 53.5 dBA from the 67.6 originally predicted.

In a report dated June 19, 2007, NEAQT offered further predictions about noise levels from the proposed expansion. This report specifically focused on sound levels at the Boardman residence on Batten Road. The second report made further predictions, but was not based on new measurements. The report relied on the measurements conducted November 30, 2006, which were also the basis of the January 22 report. This second report concluded that the predicted average dBA would exceed the 55 dBA standard at the Boardman residence. As mitigation, the Applicants proposed to leave the hillside above the crusher in place through most of the project. NEAQT predicted that leaving the hillside in place would result in 49.9 dBA as an average, thus falling within the 55 dBA standard. At the Board's hearing on June 19, 2007, David Wechsler from NEAQT was available to respond to Board questions about its sound analyses and reports.

Also on the issue of noise levels, the neighbors to the proposed pit expansion offered two reports from the Noise Pollution Clearinghouse and a representative of that organization, Les Blomberg, discussed the report. Neighbor Colin Seaman established Mr. Blomberg's expertise in the area of noise regulation and noise impacts. Mr. Blomberg described the noise characteristics of the Balentine and Batten Road neighborhoods as "dominated by natural sounds, primarily birds and the sound of wind blowing in the trees." Mr. Blomberg also asserted that the 55 and 70 dBA criteria are not the only ones used in Act 250 proceedings, a point that the Applicants did not counter with further information or discussion on the Pike Industries case standard. Mr. Blomberg described the 55dBA as consistent with the residential noise levels in an urban area such as Denver, Colorado.

Further, Mr. Blomberg noted that the NEAQT studies did not consider many noises characteristic of extraction activities. Equipment such as loaders, trucks, banging gates on trucks, and back up beepers may generate significant noise. Since NEAQT considered only the noise of the crushing operation, which is fixed at a distance relatively far from the Balentine and Batten Road neighbors, other significant sources of noise that may occur closer to the neighboring residences should also have been considered. Finally, Mr. Blomberg asserted that atmospheric conditions, such as prevailing winds and inversions, will decrease the effectiveness of the mitigation strategies offered by the Applicants.

The Applicants proposed in their initial submittal in Application #07-07 to extend gravel extraction operations from the McCullough Crushing Pit progressing in a southerly and westerly direction (from north and east to west), with excavation occurring in separate phases, beginning each phase in the northern portion of the site and excavating to the south. This submittal called for minimizing the amount of area cleared at any one time (approximately 6 +/- acres), "as much as possible" and for stabilizing finished side slopes "as soon as practicable." During the course of the hearing, the Applicants' discussed modifications to this proposal to retain the hillside adjacent to the crusher as recommended in the second NEAQT stud. They were also vague as to the sequence of extraction phases and the total number of acres that would be exposed at any one time. They indicated that their extractions activities at the site would be guided by the quality of the material found and commercial demands.

The Applicants represented that at the reclamation stage, the bottom of the Rathburn Extraction Area will be at an elevation of 900 feet, with the final contours of the site sloping gently from the bottom to the north to the existing McCullough Crushing Pit and to the west on a one-on-one grade and a half grade from the bottom of the pit up to the existing field. When final grade is achieved on a portion of the side slope, 2 to 4 inches of topsoil is to be placed over the slope and the area is to be seeded and mulched. At the end of reclamation, the site will be available for other land uses. The Applicants provided the Board with a draft Reclamation Escrow Agreement to enable the Town to reclaim all or a portion of the Rathburn Excavation Area should the Applicants default on reclaiming this land in accordance with Town permit requirements.

The Applicants acknowledge that, prior to reclamation, the expanded gravel pit operations will generate dust. They assert that dust will primarily come from haul roads during operations. They propose to use calcium chloride and water to control dust on these roads during the life of pit operations.

The neighbors between Route 14 and the McCullough Crushing Pit testified that they had experienced problems with dust during the 22 years that the McBuro Pit has been in operation. The neighbors along Balentine Road also expressed concern that dust from the pit expansion would result in aesthetic and potential health problems for them. One of the neighbors noted that she is asthmatic.

The Applicants acknowledge that when they are extracting material from the face of a pit, they cannot suppress the dust. During the course of the hearing, they provided no information concerning the likely levels of fugitive airborne dust particles that might be produced by project operations nor information concerning prevailing winds or other weather conditions that might affect the migration of dust from the project site. Other than proposing to control dust on haul roads with calcium chloride or water, the Applicants proposed no other mitigating measures.

The Board inquired why the access road from Route 14 to the proposed McBuro Pit, which is proposed for use in Application #07-07, had not been paved in 1987, as provided for in Conditional Use Permit #85-39. The Applicants replied that the use of calcium chloride or water was adequate for controlling dust on the access road.

The higher elevations of the Rathburn Parcel to the north and west of the proposed Rathburn Extraction Area diverts runoff to an existing stream and wetland in close proximity to the Seaman property line. This runoff currently consists of rainfall on the site and to protect these surface water resources, the Applicants propose to retain a 50- foot vegetated buffer along the length of the stream and a 100-foot buffer from the edge of the wetland.

There is a second, small isolated wetland, located partially on the McBuro Parcel and partially on the Rathburn Parcel (and shown on both the June 1985 McBuro site plan and Proposed Gravel Extraction Plan, L1) which the Applicants propose to remove during the process of extending extraction operations from the McCullough Crushing Pit

to the Rathburn Extraction Area. This wetland was delineated by the Applicants' consultants and is estimated to be .44 acres in area. The Applicants described this as a "class 3 wetland" throughout this proceeding without providing the DRB with any documentation to support its assertion that this wetland was not significant for any resources values recognized by the Town or the State. The Board observed this wetland on its site visit and asked the Applicants to explain and justify why this wetland should be eliminated during the course of the project. The Applicants advised that according to their preliminary test pits, the best gravel was located in the area of this wetland.

IV. Discussion

The proposed expanded gravel extraction and processing operations proposed in Application #07-07 will be located in the Town's Rural Residential District. Regulations, Table 2.2. The purpose of the Rural Residential District is to "provide for the development of residences and home businesses in ways that minimize impacts on open spaces, ridge lines, wetlands, wildlife habitat, prime woodland and agricultural soils, ecologically sensitive and scenic areas." Regulations, Table 2.2(A). In the Rural Residential District, "Extraction & Quarrying" are Conditional Uses requiring review by the Board in accordance with the criteria and standards of Sections 4.4 and 5.3.

Throughout this proceeding, the Applicants have urged the DRB to review the expansion of their gravel extraction and processing operations on the Rathburn Parcel in isolation from activities previously approved in their Town and Act 250 Permits. They have done so, no doubt to limit their exposure to litigation of matters that were presumably settled at the time of the issuance of those permits. This approach, however, doesn't take into consideration the fact that in order for the Applicants to pursue Application #07-07, they will use the access road, wash water and crushing facilities, and other amenities located in the McCullough Crushing Pit to service the expansion of operations into the Rathburn Extraction Area. Moreover, in order to reach the gravel and sand on the Rathburn Parcel, the Applicants plan to disturb already reclaimed and vegetated slopes and buffers, as well as destroy a small wetland that straddles the McBro and Rathburn Parcels. Finally, the Board notes that the project expiration dates in the Act 250 permits for the McCullough Crushing Pit projects is 2010, and the deadlines in the Town permits have already expired. Therefore, the Board has determined that it is appropriate to review Application #07-07 in context with the entirety of McCullough's gravel and sand extraction operations to assure that the project expansion will not unwittingly result in undue adverse impacts to resources recognized and protected under the Town's regulations.

A. Section 5.3(D) Review

Section 5.3(D) of the Regulations requires the Board to review a conditional use application under five statutory standards and, if appropriate, several discretionary standards. Under Section 5.3(D) conditional use approval must be granted by the Board upon finding that the proposed development is consistent with the general standards set

forth in the regulations for the district in which it is located and “will not have an undue adverse impact” upon the resources described in five “required standards.” These are: (1) the capacity of existing and planned community facilities and services; (2) character of the neighborhood or area affected; (3) traffic on roads and highways in the vicinity; (4) bylaws in effect; and (5) the utilization of renewable energy resources. Regulations, Section 5.3(D) at 47. Additionally, the Board may impose conditions to minimize or mitigate the adverse impacts of a proposed development under the discretionary standards of Section 5.3(E) of the Regulations, to the extent that the Board has sufficient evidence to determine what minimization or mitigation is reasonable and feasible.

In all instances, an applicant for conditional use approval bears the burden of providing the Board with sufficient information about its project and its potential impacts in order for the Board to make affirmative findings in the applicant’s favor with respect to the standards under Sections 4.4 and 5.3 of the Regulations. Even when a party does not oppose an application with respect to a certain standard, the Board has a duty to scrutinize an application for conditional use approval to ascertain whether the proposed development comports with the regulations and policies of the Town.

1. The capacity of existing and planned community facilities and services

The Board is required to consider the demand for community facilities and services that will result from the proposed development in relation to the existing and planned capacity of such services and facilities, and any municipally adopted capital budget and program currently in effect. The focus of this criterion is upon financial burdens and “demands” for services that a Town might encounter as a result of unplanned growth and related expenditures, rather than on the benefits that might accrue as a result of the presence of a particular land use or development. Regulations, Section 5.3(D)(1).

The only “demand” mentioned in the course of the proceeding was the possible adverse impact of heavy trucks hauling earth resources on Town roads during spring and at other times when the dirt roads are “soft.” However, the applicant asserted that it has no control over the travel route of independent haulers that draw earth resources from their pit, and that the Selectboard can post specific roads during spring thaw and other periods when those roads may be potentially damaged by heavy traffic.

The assertion by a neighbor that the expansion of the extraction and processing operations may result in more injuries to workers and others and thereby place an undue burden on local hospitals is noted, but no evidence was provided to substantiate this assertion.

Accordingly, the Board concludes that the project proposed in Application #07-07 will not have an undue burden on the capacity of existing and planned community facilities and services. The Board also finds that the project will not result in an undue adverse impact on public facilities and services, pursuant to Section 4.4 (C)(2)(b) of the Regulations.

During the hearing, the Applicants asserted that contrary to having a negative impact on the Town, the proposed expansion of McCullough gravel extraction and processing operations would *benefit* the Town in that the Applicants would have a continued supply of earth resources available for sale to the municipality “at the gate.” We note that the Town did not enter its appearance in this proceeding to argue in favor of Application #07-07 or to provide evidence concerning a capitol plan or other town policy that might bear on merits of this criterion. The Board did hear testimony from the Town Road Commissioner and several private contractors suggesting that the earth resources from the McCullough pit are of value to them. The Applicants also provided compelling comparative data to show how the absence of a ready source of earth resources in Calais might adversely affect the Town and other users financially given the increase in hauling costs to truck gravel and sand from elsewhere. The Board, however, was not persuaded that this evidence supported an affirmative finding under this criterion, without the underpinning of a clear statement of Town policy in the Town Plan, Regulations, Capitol Budget or other document articulating the imperative for a local source of gravel.

2. Character of the neighborhood or area affected

The character of the neighborhood or area affected is defined by the purpose or purposes of the zoning district in which the project is located, and specifically stated policies and standards in the municipal plan. The Board is required to consider the design, location, scale, and intensity of the proposed development in relation to the character of adjoining and other properties likely to be affected by the proposed use. Conditions may be imposed as appropriate to ensure that the proposed development is compatible with the character of the area or neighborhood, as determined from zoning district purpose statement, the municipal plan, and testimony from affected property owners. Conditions may be imposed as necessary to eliminate or mitigate adverse impacts, including but not limited to conditions on the design, scale, intensity or operation of the proposed use. Regulations, Section 5.3(D)(2).

As stated above, the purpose of the Rural Residential District is to “provide for the development of residences and home businesses in ways that minimize impacts on open spaces, ridge lines, wetlands, wildlife habitat, prime woodland and agricultural soils, ecologically sensitive and scenic areas.” Regulations, Table 2.2(A) at 17. Therefore, residential use is the primary value to be protected in this zoning district, accompanied with the protection of certain natural resources.

In evaluating the specific character of the neighborhood in the vicinity of the existing and proposed McCullough operations, the Board concluded that there are two distinct neighborhoods for assessing the character of the area. There is the neighborhood adjacent to Route 14, which clearly has a mix of residential and other uses, including long-standing gravel extraction by several entities, and the noisy traffic of Vermont Route 14. In the Board’s opinion, there may be some impacts on the character of this area from the proposed activities covered by Application #07-07, but the Board has determined that these impacts will not be undue.

The same, however, cannot be said for the impact on the very rural neighborhood along Balentine Road, consisting as it does of a few scattered residences separated from the existing gravel extractions and processing operations by woodland and a dominant and distinctive open space feature, the Rathburn hay field. In the Board's opinion, the forested buffer referred to in prior permits as mitigating noise impacts, providing valuable wildlife habitat, and perhaps protecting water quality, in addition to the project setbacks shown in the June 1985 McBro Site Plan, have provided ample physical separation and visual and auditory screening that will be largely eliminated by the Applicants' proposal to extend its operations to the Rathburn Parcel.

The 2003 Town Plan identifies gravel deposits as a mineral resource of value to Calais, worthy of conservation. The plan also recognizes that: "While these deposits may yield important and needed materials for road and building construction, Calais' coincidental development patterns render their extraction a matter of some sensitivity." 2003 Town Plan, Part II(E), Mineral Resources. Section 4.4. requires the Board to deny approval for proposed gravel extraction operation if it finds that such a project will result in an undue adverse impact, on among other things, neighboring properties due to noise, dust and vibration. Regulations, Section 4.4 (C)(2)(a).

Both the Applicants' and the neighbors' noise experts acknowledge that the sound of extraction equipment and processing activities will be clearly audible at adjacent properties. The Board believes that in order to consider whether the noise impact will be "undue," the Board must consider the character of the neighborhood as discussed in the Board findings Regulations, Section 5.3(D)(2).

Given the quiet, rural nature of the Balentine and Batten Roads neighborhood and taking into account the neighbors assertions that birdsong and breeze in the trees is the current dominant sound, the Board finds the Applicants have not met their burden to demonstrate that the adverse noise impact would not be undue on the character of this neighborhood. Without information to adequately assess the levels of noise at property lines, the Board cannot also assess the effectiveness of various mitigations strategies to determine whether any adverse impacts would not be "undue." The Board notes, however, that permits for the existing operations included significant setbacks and vegetative buffers, in part established to mitigate noise impact on the neighborhood surrounding the existing gravel extraction and processing operations. The proposed expansion appears to eliminate some of those natural vegetative buffers and the Board did not hear evidence on the noise impact of such buffer removal.

The Applicants did not provide information about project operations at various times of the year using various pieces of mobile equipment under different weather conditions, such that the Board can make affirmative findings in the Applicants' favor that noise impacts will not be "undue" adverse impacts. Further, while the Applicants cited a Pike Industries standard for noise, they did not respond to Mr. Blomberg's assertion that Act 250 considers other standards for noise and that therefore the standard proposed by the Applicants are not the only standards. The Applicants did not draw

parallels between the facts of the Pike Industries case and the proposed expansion of the McCullough operations to the Rathburn Parcel.

Finally, the Board finds the Applicants did not meet their burden with regard to noise impact because the sound measurements were not conducted at the property lines, but instead were based on predictions of measurements taken at other points, and were taken within a very short time span – only one hour and ten minutes – on only one day. In short, the original measurements on which all predictions were based were not expansive enough to support an affirmative finding of no undue adverse noise impact on neighboring properties, pursuant to Section 4.4.

With regard to dust, the Board concludes that calcium chloride and water are appropriate controls for haul roads within the expanded extraction project. However, the Applicants provided insufficient evidence to evaluate whether their proposal will result in undue adverse impacts at neighboring properties as a result of extraction and crushing activities at the site. The Board is also not satisfied that calcium chloride and water are appropriate controls for the access road, as it received limited testimony on this topic, and the Town permit for the McBro operations required that the access road be paved.

For the forgoing reasons, the Board concludes that the Applicants have failed to meet their burden of proof both with respect to Section 4.4 (C)(2) and Section 5.3(D)(2) of the Regulations.

3. Traffic on roads and highways in the vicinity

The Board is charged with considering the potential impact of traffic generated by the proposed development on the capacity, safety, efficiency, and maintenance of roads, highways, intersections, bridges, and the effect of pedestrians and bicyclists in the vicinity of the proposed project. The Board may require a traffic impact assessment. It may also impose conditions as necessary to ensure that a proposed development will not result in unsafe conditions for pedestrians or motorists, including but not limited to physical improvements on or off site, or accepted traffic management strategies. Regulations, Section 5.3(D)(3).

The Applicants have represented that throughout the life of this project, all equipment and truck access to the Rathburn Expansion Area will be from Vermont Route 14, using the existing access road. The only exception will be during the first phase of their project when they propose to construct an earthen berm between the Rathburn Parcel and the Seaman property. In order to accomplish this phase, the Applicants propose to bring heavy equipment from Balentine Road onto the Rathburn Parcel using an existing farm road.

The volume of trucks entering and leaving the McCullough operations in a given year is estimated to be the same as the total number of trucks presently permitted for the Hudson and McBro Pits, although the Applicants observed that in recent years the

number of trucks leaving their operations have been less than the maximum number permitted.

As noted above with reference to Section 5.3(D)(1), the only concern about road impacts mentioned in the course of the proceeding was the possible adverse impact of heavy trucks hauling earth resources on Town roads during spring and at other times when the dirt roads are “soft.” The Town Road Commissioner offered no testimony on the issue whether the proposed project would present any concerns regarding the capacity, safety, efficiency and maintenance of Town roads, nor did any neighbor, once the Applicants clarified that the point of access for equipment and haul trucks would be Vermont Route 14.

4. Bylaws in effect

The Board must determine whether the proposed development conforms to other municipal bylaws and ordinances currently in effect, including but not limited to any road and on-site wastewater ordinances. The Board shall not approve a proposed development that does not meet the requirements of other bylaws and ordinances in effect at the time of application. Regulations, Section 5.3(D)(4).

The current Town Application #07-07 was filed with the Town less than a month before the adoption of the latest amendments to the Town Regulations. However, the Board has determined that those amendments are not material to the application under review.

Since the project will use its existing access from a State highway, Vermont Route 14, the Town’s curb cut regulations do not apply. The Town’s sewage ordinance does not appear to apply as the project will not require on-site gray water or sewage disposal. Likewise, no party has brought to the DRB’s attention other ordinances that might be applicable to this project.

Accordingly, the Board concludes that the Applicants have met their burden of proof in demonstrating that their proposed expansion of existing gravel extraction and processing operations will not result in an undue adverse impact with respect to Town bylaws and ordinances in effect at the time of application pursuant to Section 5.3(D)(4).

5. The utilization of renewable energy resources

The Board is required to consider whether a proposed development will interfere with the sustainable use of renewable energy resources by either diminishing their future availability, or by interfering with neighboring property owners’ access to such resources (e.g., for solar or wind power). Conditions may be imposed as appropriate to ensure access to and the long-term availability of renewable energy resources. Regulations, Section 5.4(D)(5).

The Board concludes that the proposed project will have no undue adverse impact under this criterion. The proposed project will not interfere with any known sustainable use of renewable energy resources and no neighboring property owners have objected to the project on the basis that their access to renewable energy resources will be compromised by the Applicants' proposal.

6. Discretionary Standards

Additionally, the Board has discretionary authority to impose various conditions: (1) to protect the public's health and environmental safety; (2) to control access and circulation on- and off-site; (3) to maintain the character of the area through landscaping, screening, site grading, or other measures; (4) to impose setback distances and buffer areas as may be reasonably necessary to protect adjoining properties, surface waters, wetlands, shoreland areas, and other natural and cultural features from incompatible development; and (5) to mitigate long-term impacts of stormwater and erosion through various controls and buffer management plans. Regulations, Section 5.3(E). The authority to impose conditions is directly correlated to the Board's authority to mitigate adverse impacts under the five statutory criteria. Consequently, the Board concludes that it is premature to apply these standards, given that it has determined that the Applicants have failed to meet their burden of proof in several key respects.

B. Additional Section 4.4 Review

Section 4.4(A) states: "The extraction, quarrying or removal of topsoil, sand, gravel, rock, minerals or other similar materials, and the on-site storage and processing of materials, may be allowed in designated zoning districts as a conditional use subject to conditional use review under Article [sic] 5.3 and the provisions of this Section." The proposed development does not meet any of the exemptions from review found in Section 4.4 of the Regulations as it entails the extraction of more than 3,500 cubic yards of material, that material is being extracted for commercial sale for use off site, and the project involved the expansion of operations to a parcel of land adjoining the existing two pits. Regulations, Section 4.4(A).

Section 4.4(B) of the Regulations states that the Board shall conduct a Preliminary Open Hearing with the applicant of an extraction or quarrying operation and interested parties to review the application and to identify the specifics of Conditional Use approval. The applicant is required to include in its application information showing "the extent and magnitude of the proposed operation." Regulations, Section 4.4(B).

The meeting with the Board on March 30, 2006, with Scott and Fred McCullough did not constitute a Preliminary Open Hearing; the Applicants themselves referred to it as an "informal meeting" to determine whether the new regulations would present any obstacles to their project. Nevertheless, even if the meeting with the Board on March 30, 2006, were deemed a Preliminary Open Hearing, it is evident from the Minutes of that meeting that the Applicants proposed an extraction area of 5 acres, not 15 acres, as

presently proposed and therefore the extent and magnitude of proposed operations are significantly different from those now being reviewed by the Board.

Section 4.4(C)(1) of the Regulations states that the Board shall grant Conditional Use Approval after determining that the proposed extraction or quarrying application will not create an hazard to public health and safety. The Applicants provided the Board with minimal evidence concerning the issue whether its activities would pose a hazard to the public health and safety. The Applicants offered testimony that in their many years of operations they have had only one injury at their facility. They pointed to the fact that they had been permitted for their current extraction and processing operations under a similar standard in prior permit proceedings, without a finding that they posed a hazard to public health and safety.

The Board also notes that with so little information from the Applicants concerning actual or potential dust impacts from the proposed expansion project, the Board cannot conclude that there will not be a hazard to public health or safety, pursuant to Section 4.4 (C)(1).

Section 4.4(C)(2) requires the Board to find that the project will not have an undue adverse impact on (a) neighboring properties due to noise, dust or vibration. The Board has addressed the subject of noise extensively in its discussion of undue adverse noise impacts on the character of the area under Section 5.3 (D)(2). It has also addressed concerns about dust above in connection with Section 4.4(C)(1). The Applicants have provided the Board with insufficient evidence to make positive findings in its favor with respect to noise and dust impacts under Section 4.4(C)(2)(a).

Section 4.4(C)(2) also requires the Board to find that the project will not have an undue adverse impact on (b) drainage, surface and groundwater.

In the course of the hearing, the Applicants denied that the drawing of groundwater for gravel washing was contributing to groundwater problems (including problems with domestic water supplies) at properties adjacent to the McCullough Crushing Pit . They also denied that they were drawing water from the Kingsbury Branch of the Winooski River to augment water in their wash-water collection pond. They provided, however, no hydrologic data whatsoever to demonstrate that the extraction and processing activities contemplated in Application #07-07 would not have an adverse impact, let alone an undue adverse impact, upon groundwater and surface water supplies in and around the project operations.

The expansion of extraction and processing operations contemplated by Application #07-07 will continue to require a ready supply of pumped water, albeit augmented by recycled wash water. The Applicants' pond is within close proximity to the Kingsbury Branch of the Winooski River and current Act 250 permits for the McCullough operations continue to authorize withdrawals of both groundwater and water from the Kingsbury Branch. Additionally, while the testimony of neighbors concerning the impacts of current operations upon domestic water supplies may be somewhat

speculative, the Board reminds the Applicants that it is their burden of proof to demonstrate that their project will have no adverse impact upon surface and groundwater supplies. Thus, the Board concludes that the Applicants have failed to meet their burden of proof in demonstrating that the continued use of water for the expanded project operations will not result in an undue adverse impact on surface and groundwater supplies within the meaning of Section 4.4(C)(2)(c) of the Regulations.

Section 4.4(C)(2) also requires the Board to find that the project will not have an undue adverse impact on (e) other natural cultural, historic or scenic features in the vicinity of the operation.

The Board is particularly concerned that the Applicants have not provided it with more information about the small wetland they propose to destroy. The Town recognizes wetlands as important natural resources, as evidenced by the statements contained in the 2003 Town Plan in Section E. Natural Resources and Water Resources, Goal 3. Indeed, as the Board advised the Applicants during the course of the hearing, Section 3.13(A)(2) states that “[a] naturally vegetated buffer strip at least 50 feet in width shall be maintained around all naturally occurring wetlands as identified on current Vermont Significant Wetland Inventory (VSWI) Maps, National Wetland Inventory (NWI) Maps, Vermont Base Maps (orthophotos), or through site investigation.” As noted previously, the Applicants provided the Board with no documentary support for their assertion that the wetland in question does not deserve protection by the Town. Without such information, the Board cannot approve the elimination of this wetland let alone reach a conclusion that the project will not have an undue adverse impact on a natural resource.

C. Landscaping, Reclamation and Surety

All previous permits granted to the Applicants or their predecessors in interest have contained reclamation conditions. Because earth resource extraction operations, by their very nature, result in significant alterations of the land within the limited life of the project, such reclamation plans are required to minimize erosion and adverse water quality and air quality impacts upon the completion of one or more phases of extraction activity. Such plans call for the reseeded of graded sites to permanent cover, including the re-establishment of forest cover and wildlife habitat lost or disturbed during the extraction process. They may also require certain landscaping elements to help screen project operations for safety, aesthetic or other reasons. During the course of this conditional use proceeding, the Applicants have filed a reclamation plan, a proposed landscaping plan, and a draft Reclamation Escrow Agreement for the Board’s review and approval.

Section 4.4(D) of the Regulations requires that “[f]or sand or gravel excavation or soil removal, a performance bond, escrow account, or other form of surety acceptable to the Selectboard shall be required as a condition of approval to cover the cost of any regarding, reseeded, reforestation or other required site reclamation activity.” The Calais Selectboard, at its meeting on July 9, 2007, discussed with the Applicants their preferred

method of surety and they confirmed that the form of draft Reclamation Escrow Agreement was acceptable, without agreeing to the substance of its provisions.

The Board commends the Applicants for preparing these documents for its review and consideration in this proceeding. Because, however, the Board concludes that it cannot and will not grant conditional use approval at this time due to the enumerated deficiencies in Application #07-07, it will not rule on the merits of the proposed reclamation plan, landscaping plan, or the draft Escrow Agreement. In response to today's Board decision, the Applicants may elect, and are in fact encouraged, to redesign certain aspects of their proposed extraction and processing operations. These design changes may in turn result in the need for further revisions to the current reclamation plan, landscape plan, and the draft Reclamation Escrow Agreement. Accordingly, the Board reserves action on these documents until such time as the Applicants submit another conditional use application, responsive to the Board's stated concerns.

IV. CONCLUSION

For the foregoing reasons, the Calais Development Review Board hereby *denies approval* of Application #07-07, *without prejudice*.

Dated this 31st day of August in Calais, Vermont.

Kristina L. Bielenberg, Acting Chair

Walt Amses, Member

Sharon Fannon, Member

Ruth Porter, Member

Barbara Weedon, Member